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Book Review

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BOOK REVIEW

CRIME, LAW AND THE SCHOLARS. By Gerhard O. W. Mueller. Seattle: University of Washington Press, 1969. Pp. xvi, 302, \$12.50.

In picking up a book described as "A History of Scholarship in American Criminal Law," the reader may understandably approach the work with some apprehension. Images are evoked of pedantic hero worship alternating with polysyllabic chastisements of evil spirits. Let me therefore first say that Professor Mueller has written a very readable book. His writing style is direct and his organization logical. He unapologetically draws incisive conclusions concerning the quality of the scholarship being discussed, without at the same time becoming the spokesman for a particular school of thought.

In commenting upon Professor Mueller's writing style, I must concede that any serious student of criminal law scholarship would want to read the observations of this distinguished scholar, no matter how poorly written. My purpose in volunteering these observations is only partly to allay the possible apprehensions of these readers. My hope is that I might also interest those who are primarily involved in other areas of law in reading this book. The history of scholarship in criminal law carries too many illustrations of the dynamics of legal evolution to be considered the concern of only the criminal lawyer. A truism long observed is that the development of an area of law depends upon the quality of talent drawn to it. Any discipline which is not "respectable" is likely to become stagnant. This proposition is demonstrated all too clearly by tracing the history of American criminal law.

In the early days of the Republic, the criminal law suffered a fate similar to that of the other fields of law. The mistrust of specialists of any sort, but especially lawyers, led to a decline in professionalism. The earlier English-trained lawyers were replaced by men whose formal legal training, if any, was confined to a reading of Blackstone.

As the middle of the nineteenth century approached, changes were being seen. Law schools had been established at a number of universities and their impact was being felt in the profession. In addition to the increased professionalism produced by academic legal education, the law schools produced written commentaries, frequently based upon Blackstone's model, which summarized and generalized upon the judicial developments occurring in the Republic.

These developments had little effect upon the criminal law, however. This area of the law had inherited from the colonial era a heavy emphasis upon biblical pronouncements, and had become so thoroughly infused with notions of religious morality that reducing it to objective analysis was a nearly unmanageable task. Further, it had become a stronghold of popular control—"layman's law." Academic lawyers may have feared arousing the remaining mistrust of

lawyers by invading this sacred region. Perhaps for these reasons, criminal law was not included in the nineteenth century renaissance of American legal scholarship (or professionalism, if you will.) It is interesting, for example, to note that Chancellor Kent, in his famous *Commentaries on American Laws*, first published in 1826, followed very closely the organization of Blackstone's *Commentaries on the Laws of England* with one major exception: he included nothing corresponding to Blackstone's fourth book on "Public Wrongs."

For whatever reason, the early revival of legal scholarship failed to include criminal law. As a result, an intellectual drought set in which was not to be broken until well into the twentieth century. Without an additional factor, however, this drought could have been broken in its early days. This additional factor was institutional inertia.

By the late 1850's, the major law schools were comfortably established. Their prestige and curricula were clearly defined. When, in 1858, Joel P. Bishop, a college drop-out whose law training consisted of one year and four months in a law office before being admitted to the bar, completed his two-volume work, *Commentaries on the Criminal Law*, the law schools saw no reason to even acknowledge his accomplishment. Subsequent editions of the *Commentaries*, as well as other writings, established Bishop as an internationally honored criminal law scholar. But, although Bishop lived and wrote in Boston, Harvard Law School never acknowledged either Bishop or criminal law scholarship. In the words of Professor Mueller: "The negative attitude taken by this university—policy-determinative as always—toward Bishop and criminal law scholarship, was to have unfortunate results for the fate of American criminal law scholarship for a long time to come."

The second oasis in the desert of criminal law scholarship was a contemporary of Bishop's—Francis W. Wharton. Wharton's writings in medical jurisprudence and comparative criminal law, as well as in domestic criminal law, earned for him international fame, honorary degrees from European universities, and a position on the Boston University faculty. Like Bishop's, however, Wharton's work was ignored by the "policy-determinative" law school. The participation of law schools in criminal law scholarship into the twentieth century was largely limited to lesser works from the smaller law schools. Marshall D. Ewell, for example, who was to become dean of Kent (subsequently Chicago-Kent) College of Law, published a *Manual in Criminal Law* originally written by Emory Washburn as a student's aid. The first casebook in criminal law was edited by Bennett and Heard, who may later have been on the faculty of Chicago College of Law, more than a decade prior to Langdell's famous casebook in contracts. Works such as these, however, were not sufficient to make criminal law intellectually fashionable.

A similar fate met early behavioral criminal studies. After a shining era in the middle nineteenth century, in which American thought, especially in penology, provided a model for the world, criminology and penology stagnated.

Dean Wigmore's attempts to bring American criminal law and criminology into the world mainstream failed, partly because of international political disputes, but also because Cesare Lombroso, whose atavistic theory of criminal behavior made him the center of international positivistic criminological study, fell out of intellectual fashion, especially in England and America. While Lombroso and his followers hoped to make criminology into a study touching upon all behavioral and social disciplines, his decline relegated criminology to the status of a frequently unwanted stepchild of sociology, where it stands today.

Professor Mueller traces the beginning of serious modern academic criminal law scholarship to the rise of twentieth century dictatorships. These challenges to traditional notions of public law, he says, led scholars to a new emphasis on the need to organize and clearly define areas of official intervention. He further hypothesizes that "refugee scholars," those who escaped dictatorial persecutions, brought to America and England both a new sense of urgency in the need to clearly outline the criminal laws and the benefits of the more advanced scholarship in criminal law which had been pursued at the European universities. From Germany, Russia and Eastern Europe came the catalysts of a new interest in criminal law.

To the criminal lawyer, the importance of this book should be obvious. In addition to writing a history of criminal law scholarship, Professor Mueller includes an interesting, if understandably brief, discussion of recent efforts, including projects directed toward measuring the efficacy of criminal law to determine human conduct. He also reports on those areas where results have been disappointing to date, such as efforts to implement psychiatric theory into the law. He candidly gives his views on the marginal utility of some costly projects, obviously reflecting a personal preference for relatively small projects which can be completed before the information becomes stale, or the inevitable turnover of personnel splinters the cohesiveness of the project.

In condensing a broad topic into a relatively small book, the author must make choices in emphasis with which others may disagree. Leon Radzinowicz, a criminologist at Cambridge University, in writing the foreword to the book, expressed disappointment at the failure to fully discuss behavioral scholarship:

Professor Mueller is obviously more at home in law than in psychiatry or sociology and he himself states that his emphasis has been upon legal rather than behavioural scholarship. He has not, therefore, explored the trends in these other fields very thoroughly. . . . Shortcomings in some directions may be the price to be paid for the boldness and sweep of his approach.

As a lawyer, I found myself more disappointed in the relatively cursory treatment given by Professor Mueller to criminal procedure scholarship. While much of this has been what he would term "spot problem" research, that is, research into particular problem areas rather than the meaning of the criminal justice system as a whole, much of it has been highly important. Undoubtedly,

much of the current interest in the criminal law is due in part to the "criminal procedure revolution" of the 1950's and 1960's. I cannot help but feel that the research and scholarship which brought the attention of the judiciary so sharply to the problems in criminal law in general, and criminal procedure in particular, make up an important chapter in the history of American criminal law scholarship. But, to again quote Leon Radzinowicz, "[S]hortcomings in some directions may be the price to be paid for the boldness and sweep of his approach."

In reviewing the highlights of criminal law development in America, Professor Mueller has supplied a case history in legal evolution which is as important in its general implications as in its role as a history of criminal law scholarship. Those of us within universities would do well to keep in mind that the traditions and mental attitudes which we help create may advance the cohesiveness and efficiency of our legal institutions—or they may retard these same objectives. To the lawyer outside the universities, Professor Mueller's book may illustrate the importance to the entire profession of that frequently condemned and even more frequently misunderstood term, "scholarship." While universities are sometimes in a better position to marshal the resources and supply the personnel for innovative scholarship, scholarship need not be, nor has it been, the sole property of the university. Neither is the university the sole beneficiary of scholarship. It benefits the entire legal system—and indeed the entire society.

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